ORIGINAL

No. 03-5165

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

MARCUS THORNTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a police officer may search the passenger compartment of an automobile as a contemporaneous incident of the lawful custodial arrest of the vehicle's recent occupant when the arrestee exited the vehicle voluntarily rather than on police direction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 325 F.3d 189. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2003. The petition for a writ of certiorari was filed on July 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for

the Eastern District of Virginia, petitioner was convicted of possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 1); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 2); and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c) (Count 3). Petitioner was sentenced to concurrent terms of 120 months of imprisonment on Counts 1 and 2, and to a consecutive term of 60 months of imprisonment on Count 3, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. A1-A12.

1. On July 21, 2001, Police Officer D. L. Nichols, who was patrolling an area of Norfolk, Virginia, in an unmarked police car, observed a Lincoln Town Car whose driver (petitioner) would not pull up to Nichols's own vehicle. Believing that the driver suspected that he was a police officer, Nichols pulled over to a side street. After the Lincoln passed by, Nichols ran a computer check on the vehicle's tags. The check revealed that the tags had been issued to a 1982 Chevrolet-model vehicle. Nichols pursued the Lincoln with the intent of stopping petitioner for driving without proper tags. Petitioner, however, turned into a shopping center parking lot before Nichols could make a traffic stop. Petitioner parked his car and exited it. Pet. App. A1-A2.

Nichols pulled in behind petitioner's vehicle and exited his

car. Nichols, who was in uniform, approached petitioner and asked for his driver's license, explaining that the tags on his car did not match the registered vehicle. Petitioner "appeared very nervous"; he "right away started rambling," "licking his lips," and "sweating." Pet. App. A1. Petitioner told Nichols that someone had given him the car. Nichols asked petitioner if he had any narcotics or weapons on him or in his car; petitioner said no. Ibid.

Nichols conducted a brief pat-down of petitioner after asking for his consent. During the pat-down, Nichols detected a "bulge" in petitioner's front left pocket, prompting him to ask petitioner whether he had any narcotics on him. Pet. App. A1-A2. Petitioner responded that he had "some weed." Id. at A2. Nichols asked petitioner to remove it from his pocket, at which time petitioner reached into his pocket and produced two bags, one containing a green leafy substance that appeared to Nichols to be marijuana, and one containing a large amount of a white rocklike substance that appeared to Nichols to be crack cocaine. Nichols arrested petitioner and then searched his vehicle. The search revealed a loaded semi-automatic pistol under the driver's seat. Ibid.

2. Before trial, petitioner moved, inter alia, to suppress the firearm found in his vehicle. Among other things, petitioner argued that the warrantless search of his vehicle could not be justified as a search incident to arrest under New York v. Belton,

453 U.S. 454 (1981), because petitioner had voluntarily exited his vehicle before he was confronted by the officer, as opposed to having been ordered out of the car.* The district court denied petitioner's motion and held that Officer Nichols's search of petitioner's vehicle was valid under Belton. Order 6 (1/28/02).

After a two-day trial, a jury found petitioner guilty on all counts. Petitioner moved for a new trial, reiterating his argument that the search of the vehicle was not authorized by Belton. The district court denied that motion on the basis of its earlier ruling denying the motion to suppress. Order 1-2 (2/19/02).

3. The court of appeals affirmed. Pet. App. A1-A12. The court noted the divergence of opinion among the lower state and federal courts concerning Belton's application to contemporaneous searches of automobiles where, as here, the arrestee has voluntarily exited the vehicle. Id. at A2. Siding with the majority of the courts that have considered that question, the Fourth Circuit rejected the argument that Belton is limited "to situations in which the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile." Id. at A4 (internal quotation marks

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* In Belton, this Court held that, whenever "a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the vehicle." 453 U.S. at 460.

omitted).

The court of appeals explained that this Court's own decisions "clearly indicate, albeit in dicta, that an officer may search an automobile incident to an arrest, even if the officer has not initiated contact while the arrestee was still in the vehicle." Pet. App. A4 (citing Michigan v. Long, 463 U.S. 1032, 1035-1036 & n.1 (1983)). Furthermore, the court stated, "the historic rationales for the search incident to arrest doctrine -- 'the need to disarm the suspect in order to take him into custody' and 'the need to preserve evidence for later use at trial' -- do not permit [a] limitation on the Belton rule" based on "whether the arrestee exits the automobile voluntarily or because of confrontation with an officer." Ibid. Indeed, the court observed, "[a] rule that requires officers to actually confront or signal confrontation with an arrestee while the arrestee is in the automobile, in order to justify a search of the automobile incident to arrest, could very well endanger an officer." Ibid.

Because the court of appeals held that the vehicle search was valid under Belton, it did not "reach the district court's alternative holding that Officer Nichols could have conducted a lawful inventory search." Pet. App. A5.

DISCUSSION

Petitioner urges (Pet. 5-6) this Court to grant certiorari to resolve the conflict among the lower courts over whether Belton's

bright-line rule applies where, as here, the arrestee exited his vehicle voluntarily, rather than on police direction, moments before he was confronted by police. As petitioner notes (Pet. 5), the Court recently granted certiorari to resolve that same question in Arizona v. Gant, 43 P.3d 188 (Ariz. App. 2002), cert. granted, 123 S. Ct. 1784 (2003) (No. 02-1019) (to be argued November 5, 2003). The petition in this case should be held pending the disposition in Gant.

As the United States has explained in its amicus brief in Gant, and as the Fourth Circuit correctly concluded in this case, see Pet. App. A4-A5, the application of Belton does not depend on the reason that an arrestee exited his car, and Belton thus squarely applies to the type of fact pattern underlying the search in this case. If the Court reaches that conclusion in Gant, the petition in this case should be denied. If the Court reaches the opposite conclusion in Gant, then the Court should grant the petition in this case, vacate the decision below, and remand for consideration of whether the district court's decision to deny petitioner's motion to suppress is supported by other grounds, which the court of appeals did not need to reach in disposing of this case based on the application of Belton. See id. at A5.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of Arizona v. Gant, No. 02-1019, and be disposed of in accordance with the Court's decision in Gant.

Respectfully submitted.

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